

<sup>2</sup> The Board notes that, following the October 29, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing January 31, 2016, causally related to her accepted December 11, 1991 employment injury.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 11, 1991 appellant, then a 30-year-old cashier, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury on December 11, 1991 when she twisted her right knee while preventing a fall on a wet surface while in the performance of duty. She stopped work on December 11, 1991 and returned to light-duty work at the employing establishment without wage loss on December 17, 1991. OWCP initially accepted appellant's claim for right knee sprain.

On September 20, 1997 appellant returned to part-time work for the El Paso, Texas public school system as a case worker assistant. She stopped work on October 1, 1998 and, on the same date, Dr. Andrew J. Palafox, an attending Board-certified orthopedic surgeon, performed OWCP-authorized debridement of an osteochondral lesion and partial meniscus tear of the left knee, and debridement of a degenerative lateral/medial meniscus lesion of the right knee. Appellant returned to full-time work for the El Paso, Texas public school system on June 1, 1999.<sup>4</sup>

Appellant continued to receive periodic treatment from Dr. Palafox who indicated that she complained of bilateral knee pain and swelling. In a February 22, 2012 report, Dr. Palafox diagnosed post-traumatic degenerative joint disease of both knees. On October 4, 2012 he, assisted by Dr. Luis Urrea, a Board-certified orthopedic surgeon, performed OWCP-authorized total knee replacement surgeries (arthroplasties) on both knees.

On December 3, 2012 appellant returned to light-duty work for the employing establishment on a full-time basis.

In a June 12, 2013 work capacity evaluation form report (Form OWCP-5c), Dr. Palafox advised that appellant was capable of performing her usual job. In a November 13, 2015 report, he reported that, upon physical examination, her knees did not exhibit erythema, drainage, or swelling, but there was slight limitation of range of motion. Dr. Palafox diagnosed status post bilateral total knee arthroplasties.

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<sup>3</sup> Docket No. 18-1395 (issued January 8, 2019); Docket No. 05-1245 (issued April 12, 2006); Docket No. 98-0935 (issued May 3, 2000).

<sup>4</sup> Appellant received FECA compensation due to loss of wage-earning capacity for periods of her private employment.

On March 18, 2015 OWCP expanded the acceptance of her claim to include bilateral knee sprains of the lateral/medial collateral ligaments, bilateral chondromalacia patellae, and other nonorganic sleep disorder.

Appellant stopped work on January 31, 2016, and later filed a recurrence claim (Form CA-2a) alleging a recurrence of disability commencing January 31, 2016, due to her accepted December 11, 1991 employment injury. She asserted that her employment-related lower extremity condition had worsened such that she was no longer capable of working.

In a February 19, 2016 report, Dr. Palafox noted that the physical examination revealed well-healed surgical scars, painful range of motion, and some mild effusion in both knees without erythema, drainage, or major crepitus. He diagnosed bilateral presence of artificial knee joints. On March 23, 2016 Dr. Palafox noted that, upon physical examination, appellant exhibited right knee swelling possibly consistent with deep vein thrombosis. He diagnosed rule out deep vein thrombosis and presence of functional implants in the knees.<sup>5</sup> In an April 21, 2016 report, Dr. Palafox advised that appellant's right knee exhibited flexion from 0 to 120 degrees upon range of motion testing and that the neurological and vascular examinations showed an intact right lower extremity. On September 27, 2017 he indicated that the examination he conducted on that date showed no major erythema or effusions of appellant's knees. There was slight crepitus and slight pain upon active/passive range of motion of the knees. In a February 22, 2018 work capacity evaluation form, Dr. Palafox listed the date of injury as April 2, 1991 and indicated that appellant was totally disabled from work.

In a March 28, 2018 development letter, OWCP requested that appellant submit additional evidence, including an attending physician's opinion supported by a medical explanation as to how her claimed recurrence of disability was due to her original accepted injury/illness, without intervening cause. It also provided a questionnaire for her completion, regarding why she believed that she sustained a recurrence of disability due to her December 11, 1991 employment injury. OWCP afforded appellant 30 days to respond.

Appellant submitted her April 20, 2018 completed questionnaire, noting that she had continuous lower extremity symptoms since December 11, 1991, which worsened in January 2016 to the point that she could no longer work. She submitted Forms OWCP-5c, dated November 6, 2016 and May 3 and September 27, 2017, in which Dr. Palafox found her totally disabled from work. On February 22, 2018 Dr. Palafox found that appellant was neurovascularly intact in her lower extremities.

In an April 25, 2018 report, Dr. Palafox indicated that appellant suffered a "relapse" of her lower extremity symptoms in February 2018 and that she had stopped working two years prior due to her "disabilities." He opined that it was medically probable that she would have increased weakness to both knees as she got older because she had degenerative changes in both knees from the injury suffered in 1991. Dr. Palafox indicated that appellant last worked on January 31, 2016 and that, up until February 2018, she was able to manage her pain and symptoms with no

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<sup>5</sup> In an addendum note added later on March 23, 2016 Dr. Palafox advised that a radiologist who obtained a right knee ultrasound at his direction felt that there was no vascular involvement in appellant's right knee. He indicated that she might have a Baker's cyst in the right knee.

significant issues. He diagnosed bilateral presence of artificial knee joints, bilateral primary knee osteoarthritis, and bilateral internal knee derangement. In an April 25, 2018 Form OWCP-5c, Dr. Palafox opined that appellant was totally disabled from work.

By decision dated June 13, 2018, OWCP denied appellant's recurrence of disability claim, finding that the medical evidence of record was insufficient to establish a recurrence of disability commencing January 31, 2016 due to her accepted December 11, 1991 employment injury. It determined that the evidence of record was insufficient to establish an objective worsening of her December 11, 1991 employment injury causing disability from work on or after January 31, 2016.

In an August 10, 2018 report, Dr. Palafox indicated that appellant complained of bilateral knee pain and difficulty with standing, sitting, and walking. Appellant reported that she felt like she was going to fall due to weakness in her lower extremities. Dr. Palafox indicated that, upon physical examination, she exhibited well-healed scars in both knees. The neurologic and vascular examinations were grossly intact, but appellant walked with a slow, steady gait and could not heel and toe walk due to weakness. Dr. Palafox diagnosed bilateral total knee aftercare and recommended that she undergo physical therapy to help with gait training and strengthening.

In an August 10, 2018 letter, Dr. Palafox indicated that appellant stopped work in January 2016 "because of her current disabilities through the year" and noted that her condition had worsened. He advised that she had more health issues "associated with this, including morbid obesity" and that she was unable to return to work because of "all of [appellant's] disabilities," which made it impossible for her to be employed. In an August 29, 2018 report, Dr. Palafox noted that, upon examination, the active range of motion of her knees was 0 to 100 degrees and there was no erythema or major effusion. He diagnosed total knee aftercare and chronic pain, and indicated that the plan was for appellant to continue with activities as tolerated.

In a September 26, 2018 report, Dr. Palafox noted that the physical examination revealed that appellant was still complaining of moderate-to-severe left knee pain. He diagnosed total knee aftercare and indicated that he aspirated her left knee and removed approximately 60 milliliters of serosanguineous fluid. Dr. Palafox noted that there was a slight suspicion for infection in the fluid and that a culture would be sent for testing. In a Form OWCP-5c report dated September 26, 2018, he checked a box marked "No" indicating that appellant was not capable of performing her usual job without restriction and another box marked "No" indicating that she was unable to work for eight hours per workday with physical restrictions. Dr. Palafox wrote "disabled" in the portion of the form report for listing work restrictions. On October 3, 2018 he noted that appellant appeared for follow-up to receive the results of the September 26, 2018 left knee aspiration and noted that, after 72 hours, the culture was negative with no organism or cellular elements seen.

Appellant appealed to the Board and, by decision dated January 8, 2019,<sup>6</sup> the Board affirmed OWCP's June 13, 2018 decision. The Board found that OWCP had properly determined that she failed to submit sufficient medical evidence to establish a recurrence of disability on or after January 31, 2016 causally related to her accepted December 11, 1991 employment injury.

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<sup>6</sup> *Supra* note 3.

On July 1, 2019 appellant requested reconsideration of the denial of her claim for recurrence of disability. In an accompanying statement, she asserted that she had weakness in her legs and that she had been totally disabled from work since January 31, 2016, due to her accepted December 11, 1991 employment injury. Appellant submitted a September 11, 2019 report, in which Daniel Rubio, a physician assistant, indicated that she presented complaining of bilateral knee pain. Mr. Rubio reported physical examination findings and noted a history of left knee arthroplasty and right knee total arthroplasty/replacement.

By decision dated October 29, 2019, OWCP denied modification of its denial of appellant's recurrence claim.

### **LEGAL PRECEDENT**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.<sup>7</sup> This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.<sup>8</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>9</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>10</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>11</sup>

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<sup>7</sup> 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>8</sup> *Id.*

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

<sup>10</sup> *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

<sup>11</sup> *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work.<sup>12</sup> As part of this burden, the employee must show a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty job requirements.<sup>13</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing January 31, 2016, causally related to her accepted December 11, 1991 employment injury.

Initially, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's June 13, 2018 decision, which was considered by the Board in its January 8, 2019 decision. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.<sup>14</sup>

After OWCP issued its June 13, 2018 decision, appellant submitted an August 10, 2018 letter from Dr. Palafox who indicated that she stopped working in January 2016 "because of [appellant's] current disabilities through the year" and noted that her condition had worsened. Dr. Palafox advised that appellant had more health issues "associated with this including morbid obesity" and advised that she was unable to return to work because of "all of [appellant's] disabilities" which made it impossible for her to be employed. The Board finds that Dr. Palafox's August 10, 2018 letter is of limited probative value regarding appellant's claim for an employment-related recurrence of disability on January 31, 2016 because the causal relationship opinion contained in the letter is not adequately supported by medical rationale. Dr. Palafox did not discuss the nature of her accepted December 11, 1991 employment injury or explain the medical process through which the accepted knee conditions could have caused total disability decades after the occurrence of the employment injury. He did not provide adequate bridging evidence regarding appellant's medical condition/treatment over the years, which would help to establish an employment related cause for her claimed disability on or after January 31, 2016.<sup>15</sup> The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/level of disability

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<sup>12</sup> See *D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>13</sup> *C.B.*, Docket No. 19-0464 (issued May 22, 2020); see *R.N.*, Docket No. 19-1685 (issued February 26, 2020).

<sup>14</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

<sup>15</sup> See *L.A.*, Docket No. 18-1570 (issued May 23, 2019) (regarding the importance of bridging evidence in establishing causal relationship between a claimed period of disability and employment factors).

has an employment-related cause. Therefore, Dr. Palafox's August 10, 2018 letter is insufficient to establish appellant's recurrence of disability claim.<sup>16</sup>

Appellant submitted reports, dated August 10 and 29 and September 26, 2018, in which Dr. Palafox discussed the condition of her knees and diagnosed bilateral total knee aftercare. In his September 26, 2018 report, Dr. Palafox discussed an aspiration procedure he performed on that date on her left knee. In an October 3, 2018 report, he noted that, after 72 hours, the culture from the September 26, 2018 left knee aspiration procedure was negative with no organism or cellular elements seen. However, these reports of his are of no probative value regarding appellant's recurrence of disability claim because they do not contain an opinion that she sustained a recurrence of disability on or after January 31, 2016 causally related to her accepted December 11, 1991 employment injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.<sup>17</sup> Therefore, these reports are insufficient to establish appellant's recurrence of disability claim.

Appellant also submitted a Form OWCP-5c dated September 26, 2018 in which Dr. Palafox checked a "No" box indicating that she was not capable of performing her usual job without restriction and another "No" box indicating that she was unable to work for eight hours per workday with physical restrictions. Dr. Palafox wrote "disabled" in the portion of the form report for listing work restrictions. Although this report includes an opinion that appellant was disabled, it does not contain an opinion that the disability was related to her accepted December 11, 1991 employment injury or any other employment factor. Therefore, this report is of no probative value regarding her recurrence of disability claim and is insufficient to establish the claim.<sup>18</sup>

Appellant submitted a September 11, 2019 report from Mr. Rubio, a physician assistant, who noted a history of left knee arthroplasty and right knee total arthroplasty/replacement. However, this report does not constitute competent medical evidence because a physician assistant is not considered a "physician" as defined under FECA.<sup>19</sup> As such, this evidence is insufficient to meet appellant's burden of proof.

As appellant has not submitted rationalized medical evidence establishing causal relationship between her claimed recurrence of disability and the accepted December 11, 1991 employment injury, the Board finds that she has not met her burden of proof.

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<sup>16</sup> See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

<sup>17</sup> See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>18</sup> *Id.*

<sup>19</sup> See *M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *P.S.*, Docket No. 17-0598 (issued June 23, 2017); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing January 31, 2016, causally related to her accepted December 11, 1991 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 28, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board